

### **REMARKS/ARGUMENTS**

Claims 1-31 are presented for consideration. Amendments have been made which are not believed to limit the scope of the original claims and are merely made to clarify some concerns raised. No new matter is believed added by any of the amendments.

Pursuant to 37 C.F.R. § 1.111, reconsideration of the present application in view of the foregoing amendments and the following remarks is respectfully requested.

#### **35 U.S.C. § 112, First Paragraph**

By way of the Office Action mailed May 31, 2005, claims 1 – 31 are rejected under 35 U.S.C. § 112, first paragraph, for failing to comply with the enablement requirement. This rejection is respectfully **traversed** to the extent that it may apply to the presently presented claims.

What is meant by activation and how activation is achieved is discussed throughout the application, and attention is directed to page 8, line 10 to line 29 and particularly page 8, lines 23-26 where it states, "This phenomenon upon activation (i.e., when the absorbent article is being donned on the wearer or during use by the wearer) creates a three-dimensional ("3-D") effect on at least one of the surfaces (36, 38) of the liner material (32) of the liner composite (30)." That is, the act of putting on (i.e., donning), or during use of the article, activates the inventive composite material by a combination of stretching and retracting portions of the composite material. Additional attention is made to page 8, line 30 to page 9, line 17 which further discusses the "retraction capability differential" and the impact that this has upon the inventive composite material. Also, see page 12, line 14 to page 13, line 30 and particularly page 12, line 34 to page 13, line 30, as well as the figures discussed in these portions of the specification. Based on at least these portions of the claims and the specification, it is respectfully submitted that one of ordinary skill in the art would readily understand how to enable the subject invention, and withdrawal of this ground for rejection is respectfully requested.

#### **35 U.S.C. § 112, Second Paragraph**

By way of the Office Action mailed May 31, 2005, claims 1 – 31 are rejected under 35 U.S.C. § 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which the Applicants regard as the invention. These rejections are respectfully **traversed** to the extent that they may apply to the presently presented claims.

Rejection has been raised in regards to independent claims 1 and 18 and what is meant by "activation". Reference is made to the just discussed locations in the specification in regards to the rejection under 112 first paragraph.

Additional rejection is made to the words "adapted to". In this regard, attention is directed to the independent claims, in particular their sub-parts labeled as (i) and (ii). This language makes it clear that it is the interaction of the extensible fluid permeable liner material and the non-tensioned elastic and the relationship of these materials that upon activation they will, as a composite, have a retraction capability differential of at least 10% and they will attain a three-dimensional configuration. Various exemplary ways to practice the invention, but not limiting it, are seen at page 5, line 28 to page 8, line 4, as well as in the supporting drawings and the remainder of the specification. Further attention is also directed to page 2, line 15 to line 21 for additional understanding of this limitation.

Additional rejection is made to the limitation that the elastic is "non-tensioned". This term is defined throughout the application, and for example, at page 6, line 29 to page 7, line 16, namely, page 6 lines 31-32. Attention is also directed to page 4, lines 15-17, where it states, "The non-tensioned elastic (34) is connected or otherwise associated with the outer cover material (32) prior to extending the outer cover material (32)." In these locations, for example, it generally refers to the elastic state before "activation" at which time it is non-tensioned or in a relaxed state.

Further rejection is made to claims 1 and 18 in regards to what the claimed extensibility is in reaction to, i.e., what force is applied to extend the liner composite at least 25%. In this regard, attention is directed to page 4, line 18 to page 5, line 23 and namely page 4, lines 19-21 where it states, "for example the fluid permeable liner material (32) – or portions thereof – is desirably capable of extending no less than...25%...". This discussion, as well as that throughout the specification and noted above in regards to "activation" indicates what the extensibility of the outer cover material relates to.

A further rejection is made to claims 2 and 21 in regards to the imitation "the three-dimensional configuration is a barrier element". While it was believed to be clear, additional clarity has been added by striking the word "is" and adding the word "comprises" to alleviate any ambiguity here. For further understanding, attention is also directed to page 12, line 34 to page 13, line 30, namely, page 13, lines 2-3.

Further rejection is made to claims 4 and 13 and the language "associated with and superposed on...to there by form a periphery". In this regard, attention is directed to page 4, lines 10-17 which

defines "associated" and to page 12, lines 14-33 and Figures 15-16, for example, which discusses the "superposed" relationship of the elements.

In regards to claim 6, it is believed adequately described in combination with the specification, for example, page 9, lines 27-36 and namely lines 32-35 and page 13, lines 11-12, all in combination with Figures 15 and 16. Considering claims 7, 10 (though the Office Action cites 19), 24 and 26, the barrier element is believed adequately described in combination with the specification, for example, page 14, lines 5-11. It is also important to note that the claims recite "a portion" of the barrier element (74) is liquid impermeable, thus allowing for the liner material per se to be fluid permeable while the combination of the liner material and the non-tensioned elastic (34) which comprise the barrier element (74) will have a portion of the barrier element which is impermeable. Turning to claim 8, and lateral orientation of the barrier element, attention is directed to the specification at, for example, page 13, lines 1-30, namely, lines 20 and 25-26, and Figures 15-16, which discuss lateral centerline (72) as the orienting direction. Looking at claim 9, and the waist elastic element, attention is directed to the specification at, for example, page 9, lines 27-35 and page 13, lines 26-30, all in combination with Figures 15-16. And, turning to claims 11 and 27, and the fit element, such is believed adequately described in combination with the specification, for example, page 14, line 24 to page 15, line 29, and particularly page 15, lines 14-29, in conjunction with Figures 17A, 17B and 17C. The fit element is similar to the barrier element in function, all as described in the specification.

Rejection is also made to claims 2-17 and 19-31 under 35 U.S.C. § 112, second paragraph, as being as incomplete for omitting essential elements. This rejection is not believed proper in light of the overall discussion of the invention throughout the specification, and particularly at, for example, page 4, line 6 to line 17 which discusses the essential elements of the invention in a complete way. As concerns the barrier element and its "structure" in the absorbent article, attention is directed to page 6, line 29 to page 7, line 16 which discusses the non-tensioned elastic and liner material and in particular the relationship between these two and their interaction, and page 8, lines 15-29, as additional discussion of some exemplary ways of practicing the invention. Still further, within the claims themselves, namely in the independent claims which are then referenced by the dependent claims being rejected, the independent claim states that the non-tensioned elastic (34) is associated with at least a portion of a surface (36, 38) of the liner material (32), and that upon activation it is the interaction or "associated" nature of these two elements that are adapted to having a retraction capability differential and that attain a three-dimensional configuration. In alternative scopes of the invention set forth in the dependent claims, such three-dimensional

configuration comprises the barrier element (74). The other elements of leg cuff, waist band and fit element are addressed just previous to this paragraph.

Finally, it is well accepted that the interpretation of patent claims is not done separate and independent from the specification and balance of the application on file. As such, while it is desirable to not have to refer to the specification to understand what a claim word means, such is not practical nor is it consistent with the accepted law and practice for interpreting a claim's meaning and scope. Differently, the claim language must be read and interpreted in conjunction with the meaning and understanding provided by the accompanying specification and drawings, and such is the case for the present application

In summary, based on the above discussion, it is believed that the rejections raised under 35 U.S.C. § 112, second paragraph, have been accommodated or rendered moot, and such rejections are thus respectfully requested to be withdrawn.

#### Judicially Created Doctrine Of Obviousness-Type Double Patenting

By way of the Office Action mailed May 31, 2005, claims 1 – 31 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting and thus provisionally unpatentable over copending Application No. 10/680,967. This rejection is respectfully **traversed** to the extent that it may apply to the presently presented claims.

In particular, while the claims of the two applications are directed to and include some similar subject matter, there not necessarily obvious in light of each other. The present application is directed to a unique liner composite comprising an extensible fluid permeable liner material and a non-tensioned elastic associated together such that upon activation the composite has defined retraction capability differentials and attains a three-dimensional configuration. Differently, the claims for pending application No. 680,967 are directed to the inventive combination of a liquid impermeable outer cover material in combination with a non-tensioned elastic that is associated such that upon activation the composite has a defined retraction capability differential and attains a three-dimensional configuration. That is, the present application deals with a fluid permeable liner material whereas the copending application deals with an impermeable outer cover material.

These materials have rather different functions and structural composition to achieve their desired in-use properties. One is fluid permeable, the other is liquid impermeable. One material is designed to comfortably rest against the skin of the wearer in the groin region where the article is applied whereas the other has an exterior surface that interacts with a wearers clothing in large part, across its surface. Clearly, absent using one claim set as a template for the other, which is not permissible in making an obviousness-type rejection, it would not be obvious to one skilled in

the art to arrive at the pending claim set in light of the copending claims, and vice versa. Accordingly, withdrawal of this provisional rejection is respectfully requested.

35 U.S.C. § 103(a)

By way of the Office Action mailed May 31, 2005, claims 1 – 31 are rejected under 35 U.S.C. § 103(a) as allegedly being obvious to one of ordinary skill in the art at the time the invention was made and thus unpatentable over EP Number 650,714 to Coles et al. ("Coles") in view of U.S. Patent Number 6,287,288 to Osborn III et al. ("Osborn"). This rejection is respectfully **traversed** to the extent that it may apply to the presently presented claims.

In making an obviousness determination it is well-known that one must consider the claimed invention as a whole. In this regard, the discussion of the applicants' invention disclosed in the specification and drawings, from above, is reasserted here by reference. In particular, the independent claims each recite a liner composite, the liner composite including an extensible, fluid permeable liner material and a non-tensioned elastic. The non-tensioned elastic and the fluid permeable liner material are associated with each other, where, upon activation of the fluid composite at least a portion of the liner composite where the liner material and the non-tensioned elastic are associated is adapted to: (i) have a retraction capability differential of at least 10% and (ii) attain a three-dimensional configuration. It is the unique combination of the extensible, fluid permeable liner material and the non-tensioned elastic, and their association with each other before, and then upon, activation of the liner composite, that defines the invention not taught or suggested in the documents of record. It is discovery of these materials, their combination and then their association and interaction when the absorbent article is being donned by the wearer, or during use by the wearer, that defines the invention that has not been taught or suggested before. For example, attention is directed to the specification at page 8, line 11 to line 29, in addition to the remainder of the specification drawings which support the claimed invention.

It is further recognized that when making an obvious determination the reference(s) must be considered as a whole and suggest the desirability, and thus the obviousness, of modifying or combining the referenced teaching(s) to obtain applicants' claimed invention. In MPEP Section 2143, the three basic elements of a valid *prima facie* case of obviousness in view of a reference are presented as:

1. some suggestion or motivation to modify the reference or to combine reference teachings;
2. a reasonable expectation of success in the modification or combination; and

3. a teaching or suggestion of all the claim elements in the reference(s) (emphasis added).

The Office Action has not provided applicants' with a reference, or combination of references, which teach or suggest all the elements of applicants' claimed invention. Of particular note, the cited Coles reference fails to teach or suggest an extensible, fluid permeable liner material, such liner material being a clearly recited element of the subject invention and necessary to practice the inventive liner composite. The Office Action recognizes that this element is missing from the Coles reference in two regards. First, the Office Action recognizes that Coles does not disclose a retraction capability differential. Second, the Office Action recognizes that Coles only discloses a layer that is generally inextensible and only extends, if at all, at most 5% across the wide range of force between 0.5 and 5 N/cm. To compensate for these deficiencies, the Office Action proposes that even if Coles does not teach such an extensible layer, the reference of Osborn does teach the use of an extensible layer in combination with the stretchable elastic film, scrim or other elastic element 1 taught in Coles.

These arguments are deficient and not proper when conducting an obviousness analysis, for several reasons. First, the subject invention clearly defines extensible to mean capable of extending no less than 10% and links that percentage of extension to the formula noted on page 5 at lines 17-23 and coupled to the test method noted at page 16. The Coles taught "elongation of not more than 5%" (Coles at column 8, lines 10-11) is far different than the extensible requirement of "capable of extending no less than 10%" (subject application at page 4, line 20) for the extensible, fluid permeable liner material of the present invention. Further, looking to the purpose and function of the unextensible or unelongatable layer 3 taught in Coles, and whether such could be readily substituted with an extensible layer as taught in Osborn, the answer has to be no. The teaching throughout Coles and at, for example, column 3, lines 29-38 and column 4, lines 14-26, clearly teaches that the Coles invention requires a stretchable elastic layer in combination with a unelongatable layer to achieve the function and objects of the Coles taught and claimed invention. Critical to the Coles invention is that during activation the elastic composite member can be extended beyond its unactivated length and such imparts a physical deformation pattern to the composite member, mainly, the unelongatable layer is permanently elongated or ruptured such that upon retraction of the elastic member a number of pleats or perforations are formed at the outer surface of the composite. This is taught further at column 9, lines 38-48 as causing gathers to be formed between bond areas of the two layers, the elastic layer and the unextensible layer. At column 8, line 56 to column 9, line 14, it further supports this requirement, and in particular states, "Activation of the composite elastic member 1 can occur by imparting a physical deformation to the inelastic layer 3, which renders the layer 3 permanently elongatable." Throughout the

specification, as embodied in the examples discussed here, and particularly recited as the definition of the first layer 3 Coles states, "With relatively unextensible or unelongatable it is meant that the layer 3 has an elongation of not more than 5% at a force between 0.5 N/cm and 5 N/cm, preferably between 1.5 N/cm and 3 N/cm" (emphasis added). It would be clearly contrary to the Coles reference to simply substitute an extensible layer, as may be taught in Osborn, for the unextensible layer 3 required by Coles. Further, even assuming such a substitution could be properly made, which the applicants' assert cannot under the doctrine of obviousness, it is unlikely that the composite structure would function as required by Coles, namely, resulting in a retracted composite having gathers on the exterior surface formed by the exterior extensible member that has been substituted for the Coles' required unextensible layer. Much differently, if the layer 3 of Coles which is taught to be unextensible were to be substituted from Osborn and be extensible, the composite material may very likely not form the necessary gathers that are taught as the subject Coles' invention. With such extensibility, the Coles modified composite would very likely not be able to achieve the required permanent elongation resulting from deformation or rupturing of that layer which is adjacent the Coles stretchable elastic member 3. As such, it would not be obvious to substitute any extensible material layer from Osborn into Coles because of the loss of intended invention taught by Coles. Rather, this appears to be a case where hindsight reconstruction, using the applicants' invention as a template, is going on to support the requirement of a reasonable expectation of success for the proposed combination of features from Coles and Osborn. It is readily accepted that such hindsight reconstruction is not acceptable in an obviousness analysis.

In summary, Coles alone and in combination with Osborn fails to teach all the claimed elements of the subject invention, namely, at least the extensible fluid permeable liner material. This single difference, while maybe appearing as only one claim element on its face, is quite significant because this element is a part of the liner composite and in the combination with the non-tensioned elastic together these two elements provide many features that neither of them alone can provide to the invention of the Applicants (i.e., this is definitely a case where the sum of the parts is worth more than each part alone). Without the extensible fluid permeable liner material feature, the unique combination of features of the invention cannot be obvious in light of the documents cited. Coles is lacking this feature, and the resulting combination, and there is not a proper suggestion or motivation to include this feature because of Coles' express teachings against such. Moreover, even if such could be properly included, the resulting structure is not Applicants' invention. For all these reasons, it is believed that a valid *prima facie* case of obviousness has not been made. Accordingly, the rejection of the claims based on 35 U.S.C. § 103 (a) is respectfully requested to be withdrawn.

Appl. No. 10/680986  
Amdt. dated November 30, 2005  
Reply to Office Action of May 31, 2005

For the reasons stated above, it is respectfully submitted that all of the presently presented claims are in form for allowance.

Please charge any prosecutorial fees which are due to Kimberly-Clark Worldwide, Inc. deposit account number 11-0875.

The undersigned may be reached at: 920-721-6854.

Respectfully submitted,

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#### CERTIFICATE OF MAILING

I, Tammi Langin, hereby certify that on November 30, 2005 this document is being deposited with the United States Postal Service as first-class mail, postage prepaid, in an envelope addressed to: Mail Stop Amendment, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450.

By: \_\_\_\_\_  
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